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GAN KIM HUA

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, MELAKA

WAN YAHYA J

b

[CRIMINAL APPEAL NO. 11 OF 1980]

7 JANUARY 1981

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CRIMINAL LAW AND PROCEDURE: *Criminal breach of trust - Section 409 - Ingredients of offence - Proof of misappropriation - Amount involved found in accused's office drawer - Whether conversion or use coupled with mens rea should be proved - Mere retention - Inference of CBT when retention coupled with an element of dishonesty - Whether defence considered adequately.*

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CRIMINAL LAW AND PROCEDURE: *Sentence - Matters to be taken into consideration - Age, sex, effect of the conviction - Possibility of reformation, the harm arising out of the offence, the nature of the offence.*

PUBLIC AUTHORITIES: *Observation - Where a superior officer discovers his subordinate had committed a criminal act which is subject to criminal proceedings whether desirable to conduct his own investigation.*

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The appellant, about 31 years of age, a Welfare Assistant attached to the Welfare Department, Melaka at the time of the offence was charged in the Sessions Court, Melaka for criminal breach of trust of RM80, an offence punishable under s. 409 of the Penal Code. She was convicted of the charge and sentenced to 6 months' imprisonment and a fine of RM1,000 or, in default of which, a further 6 months' imprisonment. She appealed against her conviction and sentence.

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It was part of appellant's duty to make out cash payments to various persons receiving welfare aids. One of the recipients of such aids was a lady (PW1). PW1 was then receiving RM60 per month as *Bantuan Bulanan* (monthly aids) and she had also applied for *Bantuan Sekolah* (Educational aids) to pay for the examination fee of her son who was about to sit for his SPM. She received her RM60 monthly and regularly from January 1979 but not the *Bantuan Sekolah* which although she had enquired about this application from the appellant but she had denied knowledge of it. On 30 May 1979, PW1 called at the Welfare Office but the appellant was on leave and PW1 was surprised to find that a thumb impression was

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affixed in the column "signature of recipient", thus signifying that she had acknowledged receipt of RM80 worth of *Bantuan Sekolah* although she had not received such payment. The thumb impression of both hands of PW1 was then taken and compared with the ones in the column and they were found to be dissimilar. On the following day, however, the appellant was questioned by the Director of her Department (PW6) and she explained that she had affixed the thumb print of an unidentifiable person in the place of PW1 in order to

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save the money from being returned to the Treasury and that she had placed the money in her office drawer. At the request of the Director she opened the drawer and produced the RM80. As PW1 had to meet the deadline for payment of her son's examination fee, she pawned her gold chain for RM50 and subsequently lodged a complaint with the BSN.

*i***Held:**

[1] Mere retention is not an offence but when retention is coupled with an element of dishonesty, then a criminal misappropriation can be correctly inferred from such retention.

[2] The recovery of the money in the appellant locked office drawer, in respect of which she held the key and enjoyed exclusive possession and control, is no worse than recovering it from her house or on her person, especially so when it was disclosed in evidence that the drawer also habitually served as a safe keeping place for her handbag and her money.

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[3] The learned President saw and heard the witnesses from which he drew his inference of dishonesty. He therefore had an advantage over the Appellate Court in assessing the credibility and veracity of the witnesses and there was no adequate reason for disturbing his findings drawn from inferences. For that reason the appeal against his decision fails. Although a punishment must normally reflect the gravity of the offence, but the seriousness of the offence is ascertainable from the sum total of various considerations, to mention a few, the age, sex, the effect of the conviction, the possibility of reformation of the offender, the harm arising out of the offence and, another important factor, the nature of the offence committed.

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[4] The sentence of 6 months' imprisonment and RM1,000 fine having regard to the circumstances, appears to be on the excessive side and the appellant shall be given her chance to reform and rehabilitate herself. The sentence of the learned President was therefore varied and the appellant was placed under bond in the sum of RM2,000 to be of good behaviour for 1 year in accordance with s. 294 of the Criminal Procedure Code.

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[Appeal against conviction dismissed. Sentence of 6 months', imprisonment and the fine set aside. Appellant was ordered to be placed under bond in the sum of RM2,000 to be of good behaviour for 1 year under s. 294 Criminal Procedure Code.]

Legislation referred to:

Criminal Procedure Code, s. 294

Penal Code, s. 409

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For the appellant - F.H. D'Cruz; M/s. Tay Leong Siak & Co.

For the respondent - Nik Abdul Rahman, DPP

JUDGMENT

Wan Yahya J:

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The appellant was charged in the Sessions Court, Melaka for criminal breach of trust, an offence punishable under s. 409 of the Penal Code.

On the date of the alleged offence the appellant was a Welfare Assistant attached to the Welfare Department, Melaka. It was part of her duty to make out cash payments to various persons receiving welfare aids. The relevant type of aids in this case are known as *Bantuan Bulanan* (monthly aids) and *Bantuan Sekolah* (Schooling or Educational aids). One of the recipients of such aids listed under the care of the appellant is a lady known as Nyachik, whom I shall hereinafter refer to as the recipient. She was then receiving RM60 per month as *Bantuan Bulanan*. She had also applied for *Bantuan Sekolah* in order to pay for the examination fee for her son Husin, who was about to sit for his SPM. She received her RM60 monthly and regularly from January 1979 but had heard nothing about the *Bantuan Sekolah*. She had enquired about this application from the appellant when receiving the monthly aid, but the latter denied knowledge of it. On 30 May 1979, the recipient called at the Welfare Office and was surprised to find that although she had received no payment, a thumb impression was affixed in the column "signature of recipient", thus signifying that she had acknowledged receipt of the RM80 worth of *Bantuan Sekolah*. The thumb impression of both hands of the recipient was then taken and compared with the ones in the column and they were found to be dissimilar.

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- a** As fate would have it, the appellant, who was paying officer on record, was on leave that day. On the following day, however, she was questioned by the Director of her Department and, according to him, she explained that she had caused to be affixed the thumb print of an unidentifiable person in the place of the recipient's order to save the money from being returned to the Treasury in Kuala Lumpur and that she had placed the money in her office drawer. According to the Director, he requested her to open the drawer and from which she produced the RM80.
- b**

In the meantime the recipient, having to meet the deadline for payment of her son's examination fee, was compelled to pawn her gold chain for RM50 and, probably out of the desire to seek for better justice elsewhere, she lodged a complaint with the BSN. At about the same time the appellant appeared with the RM80 but the recipient declined to accept. But she reappeared again on the same day with the Director himself and another lady officer of the Department. The recipient was persuaded to accept it this time.

- c**
- At the end of the prosecution, case the learned President held that a case had been made out by the prosecution and he accordingly called for the defence.
- The appellant's defence was in effect a refutation of any dishonest intention that could have been inferred against her and an explanation as to why she had not paid the money.

- d**
- The learned President rejected her defence and convicted her.

- e**
- Before this Court it was argued that the learned President was wrong in doing so. Counsel for the appellant, with his usual persuasive eloquence, submitted that the last and most important ingredient i.e., misappropriation, had not been proved. He contends that only when there is actual proof of misappropriation, conversion or use coupled with *mens rea* could the offence be considered as having been proved. Counsel submitted that the President's failure to discuss this aspect in his grounds of judgment indicated the lack of consideration given to this important ingredient of the offence, which Counsel contends, was not proved. Or, to put it shortly in the familiar legal maxim, "*Actus non facit reum nisi mens sit rea*" - or, in more understandable language, an act does not make a man guilty unless there be *mens rea* (guilty intention).

- f**
- In his grounds of judgment the learned President listed out the 3 ingredients of criminal breach of trust as

- (i) proof that the appellant was a public servant;
- (ii) entrustment; and

- g**
- (iii) breach of trust

but, unfortunately, he did not discuss in which of the three manners breach of trust had occurred in this particular case. However, the learned President did refer to several passages from *Ratanlal* and *Gour*, which, *inter alia*, relate to the measure of proof sufficient to constitute the offence and he concluded that breach of trust had been proved.

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- It is common knowledge to us that the grounds of judgment of a trial Judge are there to substantiate his findings and to support such findings by judicial reasoning whenever necessary. When a trial Judge makes a finding which is unsupported by judicial reasoning, such finding does not necessarily nullify and destroy the entire case in respect of which the finding is made. An Appellate Court may in such cases review the finding from the records before it and decide on the evidence available as to the correctness of such finding.

- i**

It appears from the records that the act by the appellant, which could constitute misappropriation in the present case, is the appellant's retention of the money, viewed perspectively with her conduct and the circumstances surrounding such retention. Mere retention is not an offence but when retention is coupled with an element of dishonesty, then a criminal misappropriation can be correctly inferred from such retention.

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This was obviously what the learned President had in mind but did not fully express when he discussed at length the dishonest intention of the appellant. The learned President considered and concluded that the retention was not an innocent act but was motivated by a dishonest intention. He listed several circumstances from which he drew the dishonest intention of the appellant.

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Firstly, he said the affixing of somebody else's thumb print in place of the rightful recipient is dishonest. He found that the appellant had no reason to do so as on 6 January 1979 she still had about 2 weeks (but as discovered from records 2 months) time to locate the recipient. He was also influenced by her failure to inform or return the money to the clerk.

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Next, the learned President considered the appellant's contention about her claim of overlooking the matter after she had placed the thumb print. Here again the learned President reasoned that the appellant had met the recipient soon after the thumb print episode and several times thereafter at monthly intervals and ruled that she could not have forgotten. He also dismissed her claim that the aided persons including the recipient were so impersonal to her during the numerous handouts of welfare aid on the grounds of the procedure which entails her looking and comparing cards with ICs and taking thumb impressions.

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Then the learned President dealt with the question of the recovery of money from the drawer and he held that even if accepted, such evidence did not conclusively prove that the money was not the very same one left in her drawer throughout this period.

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At any rate he ruled that misappropriation had taken place the moment the appellant had placed the money in the drawer with dishonest intention.

The first mentioned issue raised must be taken with reservation but the second one is, in my opinion, the correct proposition of the law. Misappropriation could have taken place the moment the appellant placed the money in her office drawer if at that moment she had formed the intention to keep it for herself. The office drawer used by an employee of the office is the property of the office but not necessarily its contents, which may consist of personal effects of the officer. Therefore recovery of the money in the appellant's locked office drawer, in respect of which she held the key and enjoyed exclusive possession and control, is no worse than recovering it from her house or on her person, especially so when it was disclosed in evidence that the drawer also habitually served as a safe keeping place for her handbag and her money.

*f**g*

If the learned President's inference of the appellant's dishonest intention is sustainable, then the subsequent production of the amount by the appellant from the drawer must unsurprisingly become unconvincing to the learned President.

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However, it would be wrong for him to reject the inference in favour of the appellant if her superior (PW6) had himself searched the drawer in the presence of the appellant and had found the exact amount only or that the money was kept separately from other monies in the drawer.

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- a* Lastly the learned President dealt with the conflicting evidence between the appellant and the recipient regarding the enquiry she had personally made to the appellant about the *Bantuan Sekolah*. He rejected the evidence of the appellant and accepted that of the recipient (PW1) and found as a fact that there was no oversight by the appellant as she had been asked about the matter after 6 January 1979, i.e. the date on which the money was alleged to have been kept in the drawer and forgotten.
- b* Counsel for the appellant referred this Court to several passages from the notes of evidence and suggested that the recipient was confused as to the actual date of her alleged enquiry and therefore her evidence on this could not be relied upon.
- I have no doubt from the records that the recipient is an illiterate lady and appeared to be uncertain about the dates. But, although she had difficulty in remembering dates, she did
- c* not appear to have difficulty in recalling events such as the monthly meeting with the appellant to receive payments. She recalled that the enquiries were made during these meetings.
- Another factor, which supports her evidence, is her financial plight. She had to pay for her son's fees by May or June 1979 and until then there existed the expectancy of aid. By common reasoning one would have expected her to make enquiries before resorting to pawning her
- d* jewellery. Besides these, her evidence was also corroborated by her nephew(PW2).
- I hold that the learned President was entitled to accept this evidence.
- There remains only one other ground of appeal to deal with, i.e. the learned President's failure to consider the defence adequately.
- e* It is true that the learned President did not set out in his grounds of judgment the entire explanation given by the appellant in her defence but then, as he had explained in his judgment, the story was substantially the same as in her cautioned statement. This statement, which was tendered during the prosecution case, was commented on and discussed by the learned President earlier in his judgment. He had therefore not reproduced it to avoid repetition of what he had already commented on and decided. He had therefore chosen to discuss
- f* only those evidence which did not arise before the prosecution closed its case.
- The learned President, after considering the case as a whole and noting the various contradictions and inferences, decided that the defence had failed to cast any doubt on his earlier finding, i.e. the appellant had misappropriated the money.
- The learned President saw and heard the witnesses from which he drew his inference of dishonesty. He therefore had an advantage over the Appellate Court in assessing the
- g* credibility and veracity of the witnesses.
- I find no adequate reason for disturbing his findings drawn from inferences. For that reason the appeal against his decision fails.
- Out of this case there emerges one important pointer. Where a superior officer discovers
- h* that his subordinate has committed an act which may have the tendency to expose such subordinate to a criminal charge, it is highly undesirable for him to plunge into or embark upon a course of investigation against the officer himself for various reasons. To start with, he may not be sufficiently experienced in conducting a criminal investigation and, even if he is, he may not be equipped with the necessary powers to proceed with the investigation successfully. Secondly, he may find himself eventually ending up as a kind of witness who
- i* stands precariously between the prosecution and the defence. And lastly, no matter how honest he is, the public may yet hold some reservation about his partiality towards his own staff.

It would be a good practice for such superior officer, on detecting any criminal element in the official conduct of his subordinate, to refer the matter to a competent Government agency authorised to make investigations in that respect. In this manner he will be doing us all, viz., himself, the subordinate officer and the Court in which the matter subsequently arises, an excellent service.

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The last ground of appeal states that the punishment is excessive. The learned President had imposed upon the appellant a term of 6 months' imprisonment and a further fine of RM1,000 or, in default of which, a further 6 months' imprisonment. It appears from his judgment that he was unduly influenced by the maximum term imposable under s. 409 of the Penal Code as well as the desire to provide a deterrent for similar offences. It is true that a punishment must normally reflect the gravity of the offence, but the seriousness of the offence is ascertainable from the sum total of various considerations, to mention a few, the age, the sex, the effect of the conviction, the possibility of reformation of the offender, the harm arising out of the offence and, another important factor, the nature of the offence committed.

b**c**

The appellant is a young and inexperienced lady of about 31 years of age at the time of the offence. She has painfully arisen from the humble post of a typist and had just assumed office as a Welfare Assistant one year before the incident. She had been subjected to departmental action and she was not spared the agony of a criminal trial. She must have suffered great humiliation and with this conviction she will almost certainly lose the job for which she had waited almost 10 years to obtain. She is married with children. She had never been in a brush with the law before and she had made full restitution of the sum misappropriated. The offence committed lacked the usual felonious element of shrewdness and artifice and displays obvious signs of stupidity. Sending her to jail does not appear to be the best way towards reforming her. The gruelling enquiries and trials must surely serve as the most unforgettable lesson in her life and will certainly provide a grim and lasting reminder to others and serve as deterrent towards wrongful temptations.

d**e**

The punishment, having regard to the circumstances, appears to be on the excessive side. The appellant shall be given her chance to reform and rehabilitate herself.

The sentence of the learned President is therefore varied. The orders of 6 months' imprisonment and RM1,000 fine are set aside and in lieu thereof the appellant will be placed under bond in the sum of RM2,000 to be of good behaviour for 1 year in accordance with s. 294 of the Criminal Procedure Code.

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Also found at [1983] 1 CLJ 199

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